Filed 4/29/19 In re B.C. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re B.C., a Person Coming Under the Juvenile Court Law.	C087822
SACRAMENTO COUNTY DEPARTMENT OF CHILD, FAMILY AND ADULT SERVICES, Plaintiff and Respondent, v. R.C., Defendant and Appellant.	(Super. Ct. No. JD237923)

R.C. (mother) appeals from the juvenile court's order terminating parental rights and choosing adoption as the permanent plan for minor B.C. (Welf. & Inst. Code, § 366.26.)[1] Mother contends that the juvenile court and the Sacramento County

[1] Undesignated statutory references are to the Welfare and Institutions Code.

Department of Child, Family, and Adult Services (the Department) failed to comply with the notice and inquiry requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) and its California implementing statutes as to B.C.'s presumed father, D.S. We remand for the limited purpose of ICWA compliance.

BACKGROUND

D.S. presented as the non-offending biological father of minor B.C., later found presumed and seriously considered for placement. (§ 361.2.) With the minor's mother, stepfather, and two siblings also in the mix, it appears from the record provided to us that the Department never inquired as to D.S.'s potential Native American heritage and later repeatedly represented to the juvenile court that ICWA did not apply, despite the Department's failure to inquire. Because concerns later developed with D.S.'s bid to achieve placement of the minor, ultimately detriment was found and parental rights were terminated. Although the juvenile court properly took judicial notice of its previous findings at the selection and implementation hearing, no ICWA finding appears in the record. The record reflects only the Department's repeated but premature conclusion that ICWA did not apply to the case. Consequently, we must conditionally reverse and remand.

The facts of the underlying dependency action are not relevant here. It suffices to say that the juvenile court took jurisdiction of the minor B.C., then six years old, and her younger half-siblings (not parties to this appeal) based on the section 300 petition's allegations that mother had put all three children at substantial risk of suffering serious physical harm, and both mother and the minor's stepfather had failed to protect the children from mother's psychiatric and emotional problems. We affirmed the dispositional order bypassing mother for reunification services. (*In re B.C.* (April 30, 2018, C084955) [nonpub. opn.].)

Mother and the stepfather had denied Indian ancestry, and the petition named D.S., who lived in Pennsylvania, as the minor's biological father. But the record does not reflect that any inquiry was made to D.S. regarding his ancestry.

We were not provided with the transcript of the February 2017[2] detention hearing, but the corresponding minute order noted that D.S. had not yet submitted the Parental Notification of Indian Status form (ICWA-020), and thus there was insufficient evidence to determine whether the ICWA applied. The lengthy report prepared in anticipation of the pre-jurisdiction status hearing, initially set for March 14, referred to D.S. as the biological father and contained two separate summaries of at least one telephone interview with him wherein he asserted that he wanted the minor to come live with him and discussed his family and social background at length. However, any discussion of Native American heritage was not reported. Nevertheless, the report concluded without explanation that ICWA did not apply to the minor's case and proposed the juvenile court find that she (and her siblings) "are not an [*sic*] Indian children."

A contested jurisdiction/disposition hearing was set for April 13; an April 4 addendum report again asserted in its proposed findings that the minor was not an Indian child. The hearing was continued to May 8, then reset for May 30. Meanwhile, D.S. remained in Pennsylvania working toward achieving placement of the minor. The contested hearing was held on May 30 through June 6; on June 13 the juvenile court announced its ruling. The court relied on the April 4 addendum to incorporate certain findings and orders, but did not make any finding as to the application of ICWA.[3]

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[2] Further date references are to 2017 unless otherwise specified.

[3] The April 4 addendum contains three sets of proposed findings and orders; the first contains the proposed jurisdictional findings, including that ICWA does not apply as to all three minors; the second is specific as to the two siblings' disposition, and the third is specific as to B.C.'s disposition. The proposed dispositional orders do not contain any reference to the ICWA. In ruling after the contested jurisdiction/disposition hearing, the

Disposition for the minor was partially completed but continued in order to explore placement with D.S.

In a report prepared for the continued dispositional hearing, the Department recommended placement with D.S. However, D.S. was subsequently involved in a concerning inter-familial dispute and the Department opined in its next report that placement with him would be detrimental. At the further dispositional hearing on September 19, the juvenile court granted D.S. presumed father status and reunification services, but the court ultimately terminated his services and set a selection and implementation hearing. (§ 366.26) In its report prepared in anticipation of that hearing, the Department again informed the court that ICWA did not apply. At the section 366.26 hearing, held on July 24, 2018, the court took judicial notice of all its previous findings, however, at that point there was no finding in the record as to the application of ICWA to the minor.

Mother appealed from the juvenile court's order terminating her parental rights.

DISCUSSION

The parties agree there is no evidence the Department or the juvenile court made any ICWA inquiry as to D.S. The Department asserts that the error is harmless. Mother disagrees, and so do we.

By any measure, the order terminating parental rights cannot stand without a limited remand for ICWA compliance, given that the biological (and presumed) father, not a party to this appeal, was never asked about his heritage; nor does there appear any

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juvenile court incorporated by reference and attachment to its minute order only the third set of (dispositional) findings and orders (with some amendments) as to B.C. Consequently, the court never incorporated by reference the proposed jurisdictional findings, including that ICWA did not apply, nor did the court state that proposed finding on the record. Thus, no ICWA finding was made at the initial jurisdiction/disposition hearing or subsequent thereto.

information as to his heritage in the record.[4] Even presuming the facts in favor of the order, where a parent was never asked about Indian ancestry, it is mere speculation to presume an inquiry would have shown no such ancestry. Such speculation cannot be deemed substantial evidence that ICWA does not apply. (*In re J.N.* (2006) 138 Cal.App.4th 450, 461.)

Under the California statutes and rules of court implementing ICWA, the juvenile court and the Department "have an affirmative and continuing duty to inquire whether a child is or may be an Indian child." (§ 224.2, subd. (a); Cal. Rules of Court, rule 5.481(a); *In re N.G., supra*, 27 Cal.App.5th at p. 481.)[5] The Department must ask the parents whether the child is or may be an Indian child and must complete form ICWA-010(A) unless the party is filing a subsequent petition and there is no new information. (Rule 5.481(a)(1).) At the parent's first appearance in any dependency case, the court must order the parent to complete form ICWA-020. (Rule 5.481(a)(2).) If the parent does not appear at the first hearing, the court must order the Department to use reasonable diligence to inform the parent of the court's order to complete form ICWA-020. (Rule 5.481(a)(3).)

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[4] There is a split of authority as to whether the burden to show ICWA error falls on the appellant, or the burden to show ICWA compliance falls on the juvenile court and department. (See, e.g., *In re Charlotte V.* (2016) 6 Cal.App.5th 51, 57 [appellate court reviews findings for substantial evidence, presumes in favor of the order]; *In re N.G.* (2018) 27 Cal.App.5th 474, 484 ["where the record does not show what, if any, efforts the agency made to discharge its duty of inquiry. . . the burden of making an adequate record demonstrating the court's and the agency's efforts to comply with ICWA's inquiry and notice requirements must fall squarely and affirmatively on the court and the agency. And in the absence of an appellate record affirmatively showing [these efforts]," "we will find the appellant's claims of ICWA error prejudicial and reversible"].)

[5] Undesignated rule references are to the California Rules of Court.

It is undisputed that the record before us does not show performance of the requirements set forth in rule 5.481, subdivisions (a)(1) through (a)(3). The juvenile court initially found that D.S. had not yet submitted the required ICWA-020 form, but the record does not reflect that D.S. was ever provided with the form. Nothing in any of the Department's reports before us shows that the Department ever inquired of D.S. (or anyone else for that matter) about his potential Indian ancestry or delegated that duty of inquiry to anyone else. There is no evidence from which we could find that "proper and adequate further inquiry and due diligence" were conducted as to D.S. (§ 224.2, subd. (i)(2).) A total failure of ICWA inquiry as to a parent cannot be deemed harmless where the record offers no additional information. (*In re J.N., supra,* 138 Cal.App.4th at p. 461 [where mother was never asked about her ancestry and no information in the record speaks to ancestry, error not harmless].) The Department's briefing cites decisions that are distinguishable from *J.N.*; this case is not. We are compelled to remand for the limited purpose of inquiring of father.

DISPOSITION

The orders terminating parental rights are reversed and the matter is remanded for the limited purpose of complying with the inquiry (and, if needed, notice) provision(s) of ICWA. If, after inquiry and notice by the Department, the juvenile court determines that the inquiry is complete, any notice is proper, and that the minor is not an Indian child, the orders shall be reinstated. However, if a tribe determines the minor is an Indian child as

defined by ICWA and the juvenile court determines that ICWA applies to this case, the court is ordered to conduct a new section 366.26 hearing and proceed in accordance with the ICWA, including considering any petition filed to invalidate prior orders. (25 U.S.C. § 1914; § 224, subd. (e).)

/s/
Duarte, J.

We concur:

/s/
Butz, Acting P. J.

/s/
Renner, J.